



## **STATEMENT OF THE CASE**

Lamont Juarez Moore appeals from the trial court's revocation of his probation.

Moore raises two issues for our review:

1. Whether the trial court provided a written statement that adequately explains its rationale for revoking Moore's probation.
2. Whether the trial court violated Moore's federal<sup>1</sup> due process rights by not considering alternatives to incarceration.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On October 30, 2003, the State charged Moore with Aiding, Inducing, or Causing Armed Robbery, as a Class B felony. On April 26, 2004, Moore pleaded guilty to that charge. The trial court sentenced Moore to ten years, with two years executed in the Department of Correction, two years served in the Madison County Work Release Center, and the remaining six years suspended to formal probation.

On June 22, 2005, the State filed a notice of probation violation against Moore, alleging that he had failed to successfully complete the work release program. On August 1, 2005, the court ordered Moore to pay fees associated with the work release program and dismissed the State's notice of probation violation. On September 21, the State filed a second notice of probation violation, alleging that Moore had failed to pay his probation-related and work release fees. On October 10, the court dismissed the second notice of probation violation after finding that "defendant has made some progress towards payment of these fees." Appellant's App. at 7. On February 13, 2006,

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<sup>1</sup> Moore does not argue that his rights under the Indiana Constitution were in any way violated.

the State filed a third notice of probation violation, alleging that Moore had committed a new criminal offense and also left Indiana without permission. On April 25, 2006, the court held an evidentiary hearing on those allegations and concluded that Moore had violated the conditions of his probation as alleged. The court then ordered Moore to serve three years of his previously suspended sentence, after which Moore was to be released to probation for the balance of his sentence.

On July 7, 2008, the State filed another notice of probation violation. In it, the State alleged that Moore committed a new criminal offense, namely, pointing a firearm, as a Class A misdemeanor. On July 29, the court held an evidentiary hearing, at which the State presented the testimony of Moore's former girlfriend, Sharletta White. White testified that she and Moore had an argument on June 5, 2008. That argument escalated, Moore grabbed a hammer, broke White's cell phone, and then threw the hammer into White's television. Moore then left the house but returned fifteen minutes later with a handgun. Moore pointed the gun at White's chest and said he would kill her. White called the local police, and Moore was arrested.

At the conclusion of the evidentiary hearing, the trial court revoked Moore's probation and ordered him to execute the remaining balance of his sentence. Specifically, the court stated:

You know . . . we've all been around long enough to know that you have to be really cautious about evaluating the testimony of . . . an unhappy ex-girlfriend. Having said that, I think there are a lot of reasons to believe Ms. White's testimony here despite the fact that she may very well be an angry ex-girlfriend. First of all, she promptly reports the events to her Grandmother, she's emotional, she talked with the Police about it. She didn't want to call the Police. In fact she goes to great trouble to explain to everybody that she's not the one who called the Police. But she promptly

talks to her Grandmother, she's emotional, she talks to the Police. What she tells the Police is consistent with what she told us today. Officer Webb saw some of the evidence of the damage in the . . . home. It's not a very far stretch really for me to imagine that somebody who is hot[-]headed enough to come in and put a hammer through a television set probably is pretty angry and may have done exactly what the witness described. And the other thing is if you're trying to get somebody in trouble, this . . . is probably not what you would do. The television is damaged. I would imagine Ms. White would have known she could have said that's my T.V. too, he damaged my T.V.[,] that's . . . mischief, that's a crime. That would have been . . . more easy to prove than somebody was there with a gun and then left with a gun or he hit me or he threatened me or he did this or that. It's just too specific. It's specific, it's credible for all the other reasons that I said. And I think that Mr. Moore, exactly what Ms. White said is exactly what happened. And so this is the second probation violation and three (3) years is left on your suspended sentence. You're going back to the Department of Correction[] for the balance of that time.

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COURT: This is a second violation and . . . Mr. Moore already served his original executed sentence and then he served another executed sentence for a prior violation, which I believe . . . had to do with handgun possession . . . . And now this is a third violation so it doesn't make a difference what the staff's recommendation is, Mr. Moore is going to go back and serve the balance of his sentence . . . .

Transcript at 78-80. And the court's subsequent written order states as follows, in relevant part:

Evidence heard and concluded. Court finds Defendant violated the conditions of probation as follows: 1) Defendant committed a new criminal offense: Ct. I: Pointing a Firearm, a Class A misdemeanor under cause number 48H02-0806-CM-2336.

Hearing as to sanctions had and concluded. Based upon the findings of the Court, the following sanction is imposed: Three (3) years of the previously suspended sentence is revoked and ordered executed at the Indiana Department of Correction. Credit time (plus good time credit) from and after 6-30-08. No return to Probation. Abstract of Judgment issued.

Appellant's App. at 14. This appeal ensued.

## DISCUSSION AND DECISION

### Standard of Review

Moore argues that the trial court denied him his due process rights when it revoked his probation. Specifically, Moore asserts that the court did not expressly state its reasons for revoking his probation in its written statement, and it did not specifically consider alternatives to incarceration prior to ordering the revocation of his probation. The due process requirements of a probation revocation proceeding, and our standard of review, are well-established:

When reviewing an appeal from the revocation of probation, we consider only the evidence most favorable to the judgment, and we will not reweigh the evidence or judge the credibility of the witnesses. Piper v. State, 770 N.E.2d 880, 882 (Ind. Ct. App. 2002), trans. denied. Probation is a favor granted by the State, not a right to which a criminal defendant is entitled. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). However, once the State grants that favor, it cannot simply revoke the privilege at its discretion. Id. Probation revocation implicates a defendant's liberty interest, which entitles him to some procedural due process. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593, 2600-2601, 33 L. Ed. 2d 484 (1972)). Because probation revocation does not deprive a defendant of his absolute liberty, but only his conditional liberty, he is not entitled to the full due process rights afforded a defendant in a criminal proceeding. Id.

The minimum requirements of due process include: (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation. Id. (citing Morrissey, 408 U.S. at 489, 92 S. Ct. at 2604).

Probation revocation is a two-step process. Id. First, the court must make a factual determination that a violation of a condition of probation actually has occurred. Id. If a violation is proven, then the trial court must

determine if the violation warrants revocation of the probation. Id. Indiana has codified the due process requirements at Ind. Code § 35-38-2-3 by requiring that an evidentiary hearing be held on the revocation and providing for confrontation and cross-examination of witnesses and representation by counsel. Id.; see also Ind. Code § 35-38-2-3(d), (e). When a probationer admits to the violations, the procedural due process safeguards and an evidentiary hearing are not necessary. Parker, 676 N.E.2d at 1085 [citing Morrissey, 408 U.S. at 490; United States v. Holland, 850 F.2d 1048, 1050-51 (5th Cir. 1988)]. Instead, the court can proceed to the second step of the inquiry and determine whether the violation warrants revocation. Id. In making the determination of whether the violation warrants revocation, the probationer must be given an opportunity to present evidence that explains and mitigates his violation. Id. at 1086[] n.4.

Terrell v. State, 886 N.E.2d 98, 100-01 (Ind. Ct. App. 2008) (emphases removed), trans. denied. Further, we will affirm revocation if, considering only the probative evidence and reasonable inferences therefrom, there is sufficient evidence supporting the conclusion that the probationer is guilty of violating any condition of probation. Ind. Code § 35-38-2-3; Hubbard v. State, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997). We will neither weigh the evidence nor assess witness credibility. Hubbard, 683 N.E.2d at 620.

### **Issue One: Adequacy of Written Statement**

Moore first argues that the court's "written statement . . . as to the evidence relied on and reasons for revoking probation" was constitutionally inadequate. See Terrell, 886 N.E.2d at 101. As we have explained:

Pursuant to IC 35-38-2-3(a), "the court may revoke an individual's probation if: (1) The person has violated a condition of probation during the probationary period . . . ." The State must prove the violation of a probation condition by a preponderance of the evidence. IC 35-38-2-3; Menifee [v. State], 600 N.E.2d [967, 970 (Ind. Ct. App. 1992)]. Due process requires a written statement by the fact finder regarding the evidence relied upon and the reasons for revoking probation. Offringa v. State, 637 N.E.2d 190, 190-91 (Ind. Ct. App. 1994). This requirement is a procedural device aimed at promoting accurate fact finding and ensuring

the accurate review of revocation decisions. Clark v. State, 580 N.E.2d 708, 710-11 (Ind. Ct. App. 1991). We have held that placing the transcript of the evidentiary hearing in the record, although not the preferred way of fulfilling the writing requirement, is sufficient if it contains a clear statement of the trial court’s reasons for revoking probation. Id. at 711-12 n.3.

Hubbard, 683 N.E.2d at 620-21 (footnote omitted; emphasis added).

Here, the trial court’s oral statements at the conclusion of the evidentiary hearing include a clear statement of both the evidence the trial court relied upon in revoking Moore’s probation and the court’s reasons for doing so. As discussed above, the trial court, after considering the weight and credibility of the witnesses, determined that the evidence demonstrated that Moore pointed a handgun at White. Moore does not dispute that his doing so was a violation of at least one condition of his probation. Accordingly, our review of the transcript<sup>2</sup> demonstrates that the trial court’s statements for revoking Moore’s probation satisfied the writing requirement demanded by due process. See id.

### **Issue Two: Alternatives to Incarceration**

Moore next argues that the trial court was required by federal due process “to consider alternatives to revocation and indicate on the record that it had done so.” Appellant’s Brief at 11 (emphasis original). But Moore properly acknowledges Black v. Romano, 471 U.S. 606 (1985), in which the United States Supreme Court discussed exactly this issue:

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<sup>2</sup> Moore’s reliance on Medicus v. State, 664 N.E.2d 1163 (Ind. 1996), is misplaced. There, our Supreme Court remanded for a more clear written statement from the trial court. But the only statement in the record, orally or written, by the trial court was its oral pronouncement that “the Court’s going to find that the defendant has violated his terms of probation.” Id. at 1164. Here, and unlike in Medicus, the trial court thoroughly explained its rationale at the evidentiary hearing. And to the extent that Moore’s arguments on appeal are a challenge to the weight or credibility of the evidence relied upon by the trial court, we reiterate that we will not reconsider that evidence. See Hubbard, 683 N.E.2d at 620.

We do not question the desirability of considering possible alternatives to imprisonment before probation is revoked. See, e.g., ABA Standards for Criminal Justice 18-7.3, and Commentary (2d ed. 1980); National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 5.4, p. 158 (1973). Nonetheless, incarceration for violation of a probation condition is not constitutionally limited to circumstances where that sanction represents the only means of promoting the State's interest in punishment and deterrence. The decision to revoke probation is generally predictive and subjective in nature, Gagnon [v. Scarpelli], 411 U.S. [778, 787 (1973)], and the fairness guaranteed by due process does not require a reviewing court to second-guess the factfinder's discretionary decision as to the appropriate sanction. Accordingly, our precedents have sought to preserve the flexible, informal nature of the revocation hearing, which does not require the full panoply of procedural safeguards associated with a criminal trial. Id., at 787-790; Morrissey, supra, at 489-490. We believe that a general requirement that the factfinder elaborate upon the reasons for a course not taken would unduly burden the revocation proceeding without significantly advancing the interests of the probationer. Cf. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 13-16 (1979) (discussing procedures where parole release decision implicated liberty interest).

The procedures already afforded by Gagnon and Morrissey protect the defendant against revocation of probation in a constitutionally unfair manner. As we observed in another context in Harris v. Rivera, 454 U.S. 339, 344-345, n. 11 (1981) (per curiam), “when other procedural safeguards have minimized the risk of unfairness, there is a diminished justification for requiring a judge to explain his rulings.” The written statement required by Gagnon and Morrissey helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence. Cf. Douglas v. Buder, 412 U.S. 430 (1973) (per curiam) (revocation invalid under Due Process Clause where there was no evidentiary support for finding that probation conditions were violated). Moreover, where the factfinder has discretion to continue probation, the procedures required by Gagnon and Morrissey assure the probationer an opportunity to present mitigating evidence and to argue that alternatives to imprisonment are appropriate. That opportunity, combined with the requirement that the factfinder state the reason for its decision and the evidence relied upon, accommodates the interests involved in a manner that satisfies procedural due process.

(Emphasis added.) In light of that language, Moore attempts to distinguish his case from Romano by alleging that the trial court here erred because it “did not allow any testimony



or other evidence following the finding that Moore had violated his probation.” Appellant’s Brief at 12.

The trial court thoroughly explained its rationale for revoking Moore’s probation and ordering him to serve the balance of his suspended sentence. In doing so, the court did not violate Moore’s federal due process rights. At the evidentiary hearing, Moore had the opportunity to be heard in person, to present witnesses and documentary evidence, and to confront and cross-examine adverse witnesses. And the trial court was clear in stating why it ordered Moore to serve the balance of his sentence:

This is a second violation and . . . Mr. Moore already served his original executed sentence and then he served another executed sentence for a prior violation, which I believe . . . had to do with handgun possession . . . . And now this is a third violation so it doesn’t make a difference what the staff’s recommendation is, Mr. Moore is going to go back and serve the balance of his sentence . . . .

Transcript at 80. The trial court’s revocation of Moore’s probation in light of Moore’s continued criminal activity was well within the court’s discretion. We affirm the revocation of Moore’s probation and the trial court’s order for him to serve the balance of his suspended sentence.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.